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No. 87-2126

In the Supreme Court of the United States

OCTOBER TERM, 1988

STAR COLOR PLATE SERVICE, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the Board acted within its discretion in ordering petitioner to bargain with the certified representative of its employees, notwithstanding the passage of time and employee turnover between the election and the Board's certification of the union.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 843 F.2d 1507. The decision and order of the National Labor Relations Board (Pet. App. C1-C11) is reported at 282 N.L.R.B. No. 31. The Board's decision and order in the underlying representation proceeding is reported at 279 N.L.R.B. 576.

JURISDICTION

The judgment of the court of appeals (Pet. App. B1-B5) was entered on April 26, 1988. The petition for a writ of certiorari was filed on June 28, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In August 1980, Local One, Amalgamated Lithographers of America ("Local One") filed a petition for a representation election in a bargaining unit consisting of the lithographic production employees at the Jamaica, New York, plant of petitioner Star Color Plate Service. Local 363 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America ("Local 363") intervened. In the representation election, conducted on March 31, 1981, there were eleven uncontested ballots: six votes were cast for Local One, five votes were cast for Local 363. Pet. App. C3; 279 N.L.R.B at 592-597. Fifteen ballots were challenged: fourteen by Local One and one by the Board (*ibid.*). Local One also filed objections to the conduct of the election (*ibid.*).

After an administrative investigation, the Board's Regional Director issued a supplemental decision in which he sustained Local One's challenge to seven ballots,[1] overruled its challenge to one ballot, and ordered that a hearing be held to resolve the remaining challenges and most of Local One's election objections. The Regional Director ordered that the matter be consolidated for hearing with pending unfair labor practice complaints against petitioner involving essentially the same allegations as the election objections. Pet. App. C3-C4.[2]

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[1] The Regional Director noted that he had already found in the Decision and Direction of Election issued on March 5, 1981, that these seven voters, four supervisors within the meaning of the Act and three non-members of the unit found appropriate, were not entitled to vote. Supplemental Decision and Order, Case No. 29-RC-5121, at 12.

[2] On Local One's appeal, the Board concluded that the challenge to the one ballot overruled by the Regional Director should also be set down for hearing. Pet. App. C4.

The administrative law judge (ALJ) issued his decision on March 17, 1983, sustaining the remaining ballot challenges and most of the election objections (Pet. App. C4; 279 N.L.R.B. at 592-597). The ALJ found that seven employees challenged by Local One had been hired by petitioner "in order to 'pack the unit' and thereby dilute [Local One's] strength in [the representation] election" (279 N.L.R.B. at 596).[3] Noting also the challenges resolved in Local One's favor by the Regional Director, the ALJ stated that petitioner's conduct exhibited an intent "to hinder and frustrate at every opportunity the wishes of its unit employees" (*ibid.*). Having found that Local One received a majority of the valid votes, the ALJ recommended that it be certified as the bargaining representative of the unit employees (*id.* at 598). In the consolidated unfair labor practice proceeding, the ALJ further found, inter alia, that petitioner had unlawfully laid off, disciplined and otherwise discriminated against employees because of their support of Local One, and that petitioner had changed its method of operations and augmented its work force in order to dilute support for Local One, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1) and (3). 279 N.L.R.B. at 582-583, 590-591, 595-598.

On April 28, 1986, the Board adopted the ALJ's findings that petitioner had engaged in unfair labor practices to discourage support of Local One, and determined that petitioner had further violated Section 8(a)(1) of the Act by soliciting employee support for Local 363 and threatening to discharge employees and close the plant if the employees supported Local One. 279 N.L.R.B. 576-577.

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[3] The ALJ sustained the Board's ballot challenge, finding that the voter at issue had voluntarily terminated his employment with petitioner. 279 N.L.R.B. at 592.

The Board also adopted the ALJ's recommendation with respect to the challenged ballots and certified Local One. Pet. App. C4; 279 N.L.R.B. 576, 577.

Petitioner filed a motion for reconsideration of the Board's decision to sustain the challenges to some of the disputed ballots, and further contended that the certification of Local One was inappropriate because five years had passed since the election, only 2 of the 20 employees in the bargaining unit at the time of the election were still in petitioner's employ, and Local One did not necessarily have the support of a majority of the current unit employees. Pet. App. C5. The Board denied the motion for reconsideration. *Ibid.*

2. On June 24, 1986, Local One requested that petitioner bargain with it. Petitioner refused to do so. Local One filed an unfair labor practice charge, and, on June 24, a complaint issued alleging that petitioner's refusal to bargain violated Section 8(a)(1) and (5) of the Act, 29 U.S.C. 158(a)(1) and (5). Pet. App. C2, C8. The Board granted summary judgment and ordered petitioner to bargain on request with Local One. Pet. App. C1-C11.[4]

The Board rejected (Pet. App. C5) petitioner's contention "that it can legitimately refuse to bargain based on the 5-year hiatus between the representation election and certification in light of the significant employee turnover." It found (*id.* at C6 n.5) that the circumstances relied on "do not constitute 'unusual circumstances' within the meaning of *Ray Brooks* v. *NLRB*, 348 U.S. 96 (1954)," which

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[4] The Board directed that the certification year, during which the union would enjoy an irrebuttable presumption of majority status, should commence on the date good faith bargaining began (Pet. App. C6 n.5). See *Mar-Jac Poultry Co.*, 136 N.L.R.B. 785 (1962); *Lamar Hotel*, 140 N.L.R.B. 226, 229 (1962), enforced, 328 F.2d 600 (5th Cir.), cert. denied, 379 U.S. 817 (1964); *Burnett Constr. Co.*, 149 N.L.R.B. 1419, 1421 (1964), enforced, 350 F.2d 57 (10th Cir. 1965).

would relieve petitioner of its obligation to bargain with the union certified by the Board after winning "the majority of the valid ballots cast in a fair election." The Board distinguished cases in which courts of appeals had refused to enforce bargaining orders because of the passage of time and employee turnover, noting that those bargaining orders had followed Board determinations that a fair election could not be held, not, as in this case, an order to bargain with a union certified on the basis of a Board election, which is "the clearly preferred method for determining a majority representative" (Pet. App. C6 n.5).

3. The court of appeals enforced the Board's bargaining order with one modification (Pet. App. A1-A8).[5] The court rejected petitioner's argument that "the Board's order should not be enforced because the passage of time between the certification election and the high turnover of employees in the bargaining unit have cast doubt upon the majority status of Local One" (*id.* at A4). The court observed that it had previously held, in *NLRB* v. *Patent Trader, Inc.*, 426 F.2d 791, 792 (2d Cir. 1970) (en banc), that delay in certification and the union's intervening loss of majority status do not justify a court of appeals' refusal to enforce a bargaining order when " 'there has been a Board election, the Union was duly certified, and the [employer] thereafter refused to bargain in good faith.' " Pet. App. A5 (quoting *Patent Trader*, 426 F.2d at 792). " 'Requiring still another Board election,' " the court held, " 'undermines the central purpose of the National Labor Relations Act, since it gives an employer an incentive to disregard its duty to bargain in the hope that over a period of time a union will lose its majority status.' " *Ibid.*

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[5] The court required the Board to give "actual notice to the current employees of their statutory right to petition for a decertification election." Pet. App. A8, B5.

(quoting *Patent Trader,* 426 F.2d at 792). While deeming "egregious" the administrative delay between the election and Local One's certification (Pet. App. A2, A4), the court, citing its decision in *Glomac Plastics, Inc.* v. *NLRB,* 592 F.2d 94, appeal after remand, 600 F.2d 3 (1979), which involved a similar situation, said that the administrative delay did not remove this case from the rule established in *Patent Trader* (Pet. App. A5-A6).

The court declined (Pet. App. A7) to remand the matter to the Board to reconsider the appropriateness of the remedy, as it had done in *Glomac Plastics,* 592 F.2d at 103.[6] The court concluded that, in this case, the Board had already considered and rejected petitioner's contention that the passage of time and employee turnover constituted "unusual circumstances" relieving it of the duty to bargain in good faith during the certification year.

ARGUMENT

The court of appeals' decision is correct, and it does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner asserts (Pet. 7-9) that, due to employee turnover that occurred during administrative delay in the certification process, Local One may not be the choice of a majority of its current employees. Therefore, petitioner

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[6] *Glomac* involved a bargaining order issued almost six years after an election and certification. On remand, the Board accepted as accurate the employer's claims of "substantial employee turnover in the unit and/or abandonment of the unit by the Union" (Pet. App. A6). The Board determined, in the exercise of its discretion, that a bargaining order nevertheless remained appropriate to effectuate the purposes of the Act. 241 N.L.R.B. 348 (1979). The court of appeals enforced the order. *NLRB* v. *Glomac Plastics, Inc.,* 600 F.2d 3, 4 (2d Cir. 1979).

argues, enforcement of the bargaining order impermissibly interferes with the rights of its current employees under Section 7 of the Act, 29 U.S.C. 157, to select their own bargaining representative. This Court, however, has consistently held that it is within the Board's remedial discretion to require an employer to bargain for a reasonable time with a union certified on the basis of a valid election even though the union had lost its majority status. In *Brooks* v. *NLRB,* 348 U.S. 96 (1954), the union had lost its majority prior to certification through no fault of the employer. The Court nonetheless rejected the employer's effort, similar to petitioner's, "to vindicate the rights of his employees to select their bargaining representative" by refusing to honor the certification of the Union. *Id.* at 103. The Court explained that the "underlying purpose of [the] statute is industrial peace"; "[t]o allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to that end, it is inimical to it." *Ibid.* See *Fall River Dyeing & Finishing Corp.* v. *NLRB,* No. 85-1208 (June 1, 1987), slip op. 9-11.[7]

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[7] Petitioner's assertion (Pet. 8, 11) that "[b]argaining orders are so inimical to free choice" and are "drastic remed[ies]" has no application in this context. In *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575 (1969), the Court, while affirming the Board's authority to issue bargaining orders on the basis of authorization card majorities, recognized that "secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support" (*id.* at 602 (footnote omitted)). Accordingly, before issuing a bargaining order on the basis of authorization cards, the Board must find that the employer's unfair labor practices have so diminished the likelihood of a fair election that a bargaining order would, on balance, better protect the employee sentiment once expressed through cards. *Id.* at 614-615. Here, in contrast, the "preferred method"—a Board election—has been used, and there is nothing "drastic" about the Board's bargaining order, which is based squarely

2. Petitioner's assertion (Pet. 11-12) that *Brooks* applies only where the certification was timely issued and not where, as here, there was a long delay between the election and the issuance of the certification is erroneous. *Brooks* recognized that the issuance of a certification might often be delayed by the need to resolve objections to the conduct of the election or challenged ballots, and for that reason sustained the Board's view that the year period during which a union majority status is ordinarily immune from attack "should run from the date of [the] certification rather than the date of [the] election." 348 U.S. at 104. Nor is it material that the delay here may in part be attributable to the Board.[8] In *NLRB* v. *Katz*, 369 U.S. 736, 748 n.16 (1962), the Court rejected the contention that enforcement of a bargaining order should be denied or conditioned on the holding of a new election because of the Board's delay in issuing the order and the affected em-

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on the results of that election. Moreover, even in the context of a bargaining order based on authorization cards, the Court in *Gissel* upheld the Board's discretion to issue a bargaining order even though it might not reflect the current wishes of the employees. *Id.* at 612-613.

[8] Petitioner erroneously suggests (Pet. 10, 11) that it had no responsibility for the delay in the union's certification, that "the Union's majority status was questionable long before the Company refused to bargain," and that it had "merely exercised its statutory right to administrative review and due process." However, the "questions" as to the union's majority status were largely attributable to disputed ballots cast, as the Board found, by employees unlawfully hired by petitioner for the express purpose of diluting the union's majority, and by ineligible supervisory employees, acting on petitioner's directions. 279 N.L.R.B. at 595-597. The union received a majority of the eligible votes notwithstanding unlawful conduct by petitioner that would have required a new election had the union failed to prevail. *Id.* at 49. Petitioner's present concern for employee free choice is the latest means of expressing its longstanding opposition to representation of its employees by Local One.

ployees' subsequent repudiation of the union. As the Court explained, "[i]nordinate delay in any case is regrettable, but Congress has introduced no time limitation into the Act except that in § 10(b)."[9]

Contrary to petitioner's assertion (Pet. 8-9), enforcement of the Board's bargaining order does not ignore the rights of the current employees who may not want the Union as their bargaining representative. "[A] bargaining relationship 'once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed,' after which the 'Board may, . . . upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships.' " *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 613 (1969) (quoting *Franks Bros.* v. *NLRB*, 321 U.S. 702, 705-706 (1949)). Moreover, to ensure that petitioner's employees would be apprised of their statutory right to change their bargaining representative at an appropriate time, the court of appeals required the Board to give the employees actual notice of that right.[10]

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[9] As authority for that conclusion, *Katz* cited *NLRB* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, 568 (1950), *Franks Bros.* v. *NLRB*, 321 U.S. 702 (1949), and *NLRB* v. *P. Lorillard Co.*, 314 U.S. 512, 513 (1941), cases in which the Board had determined that a bargaining order was appropriate notwithstanding the union's asserted loss of majority status.

[10] The notice provision is set forth at Pet. App. B5. Petitioner complains (Pet. 12) that the notice is illusory because it informs the employees of a right which they cannot exercise immediately. That argument merely takes issue with the holding of *Brooks* and its progeny that a certified union is entitled to an irrebuttable presumption of majority status for one year following certification, and that, if the employer refuses to bargain with the certified union, the Board may extend the certification year so that it does not commence until the employer begins to bargain in good faith.

3. Finally, petitioner asserts (Pet. 14-15) that the court of appeals' refusal to remand the bargaining order to the Board to redetermine its current appropriateness is inconsistent with *NLRB* v. *H.P. Hood, Inc.*, 496 F.2d 515 (1st Cir. 1974), and *NLRB* v. *St. Regis Paper Co.*, 674 F.2d 104 (1st Cir. 1982). Those decisions, however, are inapposite. Unlike this case, in *Hood* the lengthy administrative processes were not the result of an employer's unfair labor practices, but involved a difficult conflict of interest question which had resulted in several Board and court proceedings. 496 F.2d at 516-517; see *id.* at 520 ("This delay, unlike that in many cases, cannot be attributed to the tactics of [the employer]."). Moreover, in *Hood,* the Board itself had suggested the remand, and the court of appeals agreed with the Board that further consideration was appropriate. 496 F.2d at 520. In *St. Regis Paper,* the bargaining order was based on a finding that a new group of employees had been accreted to the existing bargaining unit, not, as in this case, on a certification of election results. 674 F.2d at 106. Moreover, in that case the facility involved had closed down. The court of appeals found that those "unusual circumstances" required the Board to reconsider the appropriateness of its bargaining order. *Id.* at 109. In neither case did the First Circuit adopt a rule of law that a remand for further consideration is necessary whenever there is a delay in administrative proceedings. Accordingly, the court of appeals' fact-bound conclusion in this case that no purpose would be served by a remand raises no issue of general importance meriting review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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